

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

ORIGINAL **77-2083**

To be argued by
JOHN S. MARTIN, JR.

United States Court of Appeals
FOR THE SECOND CIRCUIT

JOHN PETER GALANIS,
Petitioner-Appellant,
against

ERMEN PALLANICK, U. S. MARSHAL FOR
THE DISTRICT OF CONNECTICUT,
Respondent-Appellee.

APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF CONNECTICUT
(Civ. No. N-77-140)

REPLY BRIEF OF APPELLANT
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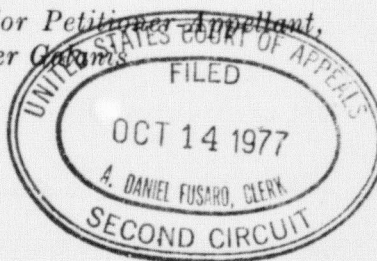


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POINT I

**The Grant Of Transactional Immunity To Galanis
Precluded The United States From Prosecuting An
Extradition Proceeding Involving A Crime He Had
Disclosed.**

In our original brief we argued that Judge Newman erred in denying our motion to dismiss the extradition proceeding on the grounds (1) that the grant of transactional immunity to Mr. Galanis precluded the United States Attorney from prosecuting an extradition proceeding involving one of the crimes he had disclosed pursuant to that

immunity; and (2) *alternatively* that, even if the grant of transactional immunity did not have that effect as a matter of law, the United States was bound by the representation made in 1973 by Assistant United States Attorney Brodsky to Galanis' attorney that the United States could not participate in such an extradition proceeding. Rather than responding to the merits of these contentions, the Government argues that this Court lacks power to review them on appeal from a denial of habeas corpus relief.

While we do not question the fact that review on habeas corpus is more limited than that available on direct appeal, the decisions of this and other courts amply demonstrate that this Court has the power and the duty to review a claim such as ours that the petitioner's fifth amendment rights were violated at the extradition hearing.

In *Gallina v. Fraser*, 278 F.2d 77 (2d Cir. 1960), this Court incorporated and adopted the opinion below of then District Judge Smith which carefully addressed the question of the scope of review available on habeas corpus in an extradition case. Judge Smith listed among the various issues which a habeas court must determine, "that the Commissioner committed no error of law prejudicial to the rights of the relator." 177 F.Supp. 856, 860. In addition, Judge Smith noted that while the hearing before the committing magistrate was not a trial, "the hearing must meet the standards of due process." *Id.* at 866.

Thus, our contention that the magistrate (here Judge Newman) violated Galanis' due process rights in erroneously denying the motion to dismiss the extradition proceeding because the participation of the United States Attorney violated both the transactional immunity conferred on Galanis and the express representation of Assistant United States Attorney Brodsky is properly before the Court for review. See also *Geer v. United States*, 513 F.2d 862 (5th Cir. 1975) and *Petition of Geisser*, 554 F.2d 698 (5th Cir. 1977); cf. *Sayne v. Shipley*, 418 F.2d 679, 686 (5th Cir. 1969).

Nor is there any merit to the argument that Judge Newman's conclusion that Galanis received only use immunity as to extradition is a factual finding which cannot be reviewed by this Court (Gov. Br., pp. 7-8). There is no factual dispute that Galanis was given transactional immunity in 1971 and that neither the Government nor Galanis considered the possibility of an extradition proceeding at that time. Thus, the issue which we raise relating to the effect of that grant of transactional immunity on the Government's attempt to prosecute an extradition proceeding relating to one of the disclosed transactions involves solely a question of law which is subject to plenary review by this Court.* *Mancusi v. United States*, 454 F.2d 454 (2d Cir. 1974), cert. denied sub nom. *Montanye v. Clayton*, 406 U.S. 977.

The Government struggles so hard to keep this Court from reviewing the merits of our claims because it apparently has no response to the substance of our argument that once the United States granted Galanis "transactional immunity" he was entitled to have his "transactional immunity" respected in the extradition proceeding. The Government has not suggested any rational way to explain how the "transactional immunity" which Galanis originally received in 1971 was somehow reduced to use immunity at the extradition proceeding in 1976.

Similarly, neither the Government nor the courts below have ever suggested any reason why the United States is

* The Government suggests that the question of transactional immunity was not raised until after the hearing before Judge Newman. (Gov. Br., p. 7). However, the issue was raised in the testimony of former Assistant United States Attorney David Brodsky, the first witness called by Galanis in support of his motion to dismiss the extradition, and was fully explored by the questions of both counsel and the Court. Thus, while it is true that the papers filed by counsel in an initial effort to obtain an evidentiary hearing on the immunity issue focused on the possible improper use by the United States of information disclosed by Galanis, the transactional immunity issue was fully litigated at the hearing and discussed at length in the subsequent briefs of the parties.

not bound to abide by the representation that Assistant United States Attorney Brodsky made to Galanis' attorney in 1973. At that time, Mr. Brodsky, in order to secure Galanis' continued cooperation in ongoing prosecutions, told Galanis' attorney that there was no need for a new agreement to preclude the Government from participating in any extradition proceeding because the prior grant of transactional immunity to Galanis precluded "U.S. prosecution or involvement" in an extradition proceeding relating to any of the matters Galanis had disclosed (Tr. 40). Since Galanis continued his cooperation with the Government until 1976, and thus performed his part of the bargain, there is no reason to relieve the United States of its duty to stand by the commitment it made to him. See *Geisser v. United States*, *supra*.

POINT II

The United States Failed To Meet Its Burden To Prove That The Evidence Submitted In Support Of Extradition Was Not Derived From Information Supplied By Galanis.

The Government attempts to meet our argument that it failed to prove an independent source for the evidence introduced at the hearing as required by *United States v. Nemes*, 555 F.2d 51 (2d Cir. 1977) by citing a number of cases which are not even remotely analogous and suggesting that our claim that Galanis had a right not to have information he provided pursuant to a grant of immunity used against him in this extradition proceeding should be dismissed as an impertinent insistence on procedural "niceties" (Gov. Br., pp. 8-10).

Mr. Galanis is not asking for the niceties of a criminal trial, either here or in Canada. He is asking simply that he be protected from having information, which he provided pursuant to a grant of "complete transactional immunity,"

used against him by the United States in a proceeding to extradite him to Canada. The Supreme Court long ago rejected the idea that one jurisdiction could illegally extract evidence from an individual and then present it on a "silver platter" to another jurisdiction where it would be used in a criminal prosecution of that individual. See *Elkins v. United States*, 364 U.S. 206 (1960).

As we noted in our original brief, there is no reason to provide less protection for Galanis' right not to have used against him the information he supplied to the Government pursuant to a grant of immunity simply because Canada and the United States are parties to an extradition treaty. *Reid v. Covert*, 354 U.S. 1, 16-17 (1957).

Given the undisputed facts (1) that Galanis provided the United States authorities with information about the Champion fraud in 1972 and the Canadian charge was not filed until 1973 and (2) that Galanis provided the United States authorities with information about Theodore Arnold and Arnold thereafter gave a crucial deposition to the Canadian Government implicating Galanis in the Champion fraud, it is not unreasonable for our courts to require proof that there was an independent source for the Arnold deposition and the other evidence used in support of the request for extradition. Even if this were to require the testimony of live witnesses, a trip from Montreal to New Haven is hardly so burdensome as to require us to sacrifice the constitutional rights of one of our citizens.

POINT III

Galanis Is Not Extraditable Because He Was Proceeded Against And Punished In The United States For The Crime For Which His Extradition Is Sought.

The Government does not contest the fact that if Article 4 of the 1971 Treaty of Extradition Between the United States and Canada is applicable to the extradition proceed-

ing commenced against Galanis in September 1976, his extradition is precluded because he has already been proceeded against and punished in this country for the crime for which his extradition is sought. Nor does the Government suggest any reason why the parties to the Treaty would not have intended to make the provisions of Article 4 applicable to all subsequent extradition proceedings.

In our original brief we have demonstrated that the language of Article 18 of the Treaty does not compel the conclusion that the provisions of Article 4 of the Treaty should not be applied in all subsequent extradition proceedings. As we noted there the provision against dual prosecution contained in Article 4 is not inconsistent with anything in the 1842 Treaty, but is rather a provision common to most modern extradition treaties that was obviously added in 1971 to bring the extradition proceedings between the United States and Canada into line with modern thinking on this subject.

The Government contends, however, that an interpretation consistent with the obvious intention of the parties to prohibit dual prosecutions in the future is precluded because the letter from the Acting Secretary of State transmitting the Treaty to the President stated "The treaty is not retroactive in effect." But the issue of retroactivity had arisen in the past only in the context of an attempt to determine whether crimes not previously included in a schedule of extraditable offenses would be retroactively made the basis for extradition. See, *e.g.*, *Cleugh v. Strakosch*, 109 F.2d 330 (9th Cir. 1940); 6 M. Whiteman, *Digest of International Law*, § 11 at pp. 753-754. Thus, the fact that the Acting Secretary of State informed the President there was no need for concern that the new schedule of extraditable offenses would be retroactively applied to offenses committed prior to the adoption of the Treaty cannot be considered as evidence that the parties did not intend the procedural changes incorporated in the Treaty to be applied in all future extradition proceedings.

Nor is there any reason for this Court to give determinative weight to the affidavit of Mr. Malmberg which was prepared specifically for this litigation. Indeed, in similar circumstances the First Circuit did not hesitate to reject Mr. Malmberg's opinion which it found at odds with a reasonable interpretation of the intent of the parties to an extradition treaty with Italy. *Greci v. Birknes*, 527 F.2d 956 (1976).

We respectfully submit that there is no rational basis for denying Mr. Galanis the protection of the provision of Article 4 of the 1971 Treaty.

POINT IV

18 U.S.C. § 3190 Does Not Preclude The Subject Of An Extradition Proceeding From Proving That The Government's Documentary Evidence Was Not Properly Authenticated.

The Government has misstated Galanis' argument with respect to the authenticity requirements of 18 U.S.C. § 3190. Galanis does not argue as did the petitioner in *Shapiro v. Ferrandina*, 478 F.2d 894 (2d Cir.), *cert. dismissed*, 414 U.S. 884 (1973), that the admissibility requirements of either New York or United States federal laws, have not been satisfied. Rather, he argued and proved overwhelmingly at the extradition hearing below that the authenticity requirements of Canadian law were not satisfied.

The Government's argument that Galanis is absolutely barred from contesting the authenticity of documents which bear a United States Consul's certificate flies in the face of the rudimentary rules on authentication in both the United States and Canada. Under our rules, see, Rule 902 Fed. R. of Evid. and Rule 44(a)(2), Fed. R. Civ. P. it is beyond question that even though the certification by the appropriate government official, including a foreign of-

ficial, creates a presumption or demonstrates prima facie evidence that the documents so certified are authentic, "in no instance is the opposite party foreclosed from disputing authenticity." 5 Weinstein's *Evidence, United States Rules*, Rule 902 at 902-4.

It is peculiarly ironic that the United States Attorney should argue that our courts should not consider the question of authenticity of documents because this is a technicality "peculiarly inappropriate in dealings with a foreign country." (Gov. Br., p. 17, quoting *Bingham v. Bradley*, 241 U.S. 511, 517) when that specific issue is one which the courts of Canada do review in extradition proceedings. In *Re Wong Shue Teen and The United States of America*, [1975], 24 C.C.C. (2d) 501 [Federal Court of Appeals] almost precisely the same situation presented here was before the Canadian Courts involving a request by the United States to Canada to extradite one of its citizens. The relevant Canadian statutes also provided that documents would be deemed authenticated if certified by an "officer of the foreign state". Although the documents in question were so certified, the Canadian Court permitted the applicant in that case to go beyond that certification for the purpose of demonstrating that in fact the documents were not properly authenticated. He successfully did so and the decision to extradite was set aside, because "all the evidence adduced against the applicant at this extradition hearing was thus contained in documents that should not have been received in evidence." *Id.* at 505.

Since the Canadian courts in extradition proceedings do go beyond the certification of the foreign officials to determine whether the documentary evidence of the demanding state are authentic, there is no reason to refuse to accord Galanis the same rights and privileges in this proceeding. We submit that this is precisely what Judge Friendly had in mind when in *Shapiro v. Ferrandina*, *supra*, 478 F.2d at 904 he emphasized that the authenticity

of documents was properly raiseable despite the United States Consul's certificate where there is proof "that the documents were not authentic or not of the sort admissible in . . . [the demanding country] for the purposes of establishing the sufficiency of the evidence".

Throughout these proceedings, the Government has repeatedly suggested that the substantial issues which Galanis has raised should be ignored by our courts because by granting Galanis his rights the court might offend or unduly burden the Canadian Government. Since Canada and the United States obviously contemplated that their rights under the extradition treaty would be reciprocal, the *Wong Shue Teen* decision clearly demonstrates that our courts would not be arrogating Canada's legitimate expectations if it were denied extradition in this case.

Respectfully submitted,

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State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON

being duly sworn, deposes

and says that he is over the age of 18 years. That on the 14th
day of October , 1977, he served two copies of the
Appellant's Reply Brief on
Hon. Richard Blumenthal, U.S. Attorney for the
District of Connecticut

the attorney for the Respondent-Appellee
by depositing the same, properly enclosed in a securely sealed
post-paid wrapper, in a Branch Post Office regularly maintained
by the Government of the United States at 90 Church Street, Borough
of Manhattan, City of New York, directed to said attorney at
No. 270 Orange Street, New Haven, Conn. () ~~N.Y.~~
that being the address designated by him for that purpose upon
the preceding papers in this action.

David F. Wilson
.....

Sworn to before me this

14th day of October , 1977.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1978